lationship. Thus, Dr. Wharton, in 1 Wh. Ev., p. 208, says: "Pedigree, if we are to understand it as co-extensive with the facts to prove which evidence of the class before us is admissible, includes not merely the relationships of families, but the dates of the births, deaths and marriages of its members, *when the object of such evidence is to trace relationship*. For *this* purpose the declarations of deceased relatives are admissible."

Prof. Greenleaf uses similar language; thus: "The term pedigree, however, embraces not only descent and relationship, but also the facts of birth, marriage, and death, and the times when these events happened. These facts therefore may be proved in the manner above mentioned, in all cases where they occur incidentally, and *in relation to pedigree*:" 1 Greenl. Ev., § 104. And this rule has been frequently followed in America to prove the time of a birth or death, when that fact is incidentally involved in a question of pedigree or relationship. See *Am. Life Ins. Co.* v. *Rosenagle*, 77 Penn. St. 516; *Morrill* v. *Foster*, 33 N. H. 386.

On the other hand such evidence, viz., declarations of deceased relatives, seems to have been sometimes admitted, where no question of pedigree or relationship was at all involved, but only the age or birth of a particular person; as when a defendant is sued on contract, and pleads his infancy in defence, he has been allowed (contrary to our principal case) to prove such fact by the declarations of parents then deceased. See *Watson* v. *Brewster*, 1 Penn. St. 383; *Clements* v. *Hunt*, 1 Jones (Law) 400. But the better opinion seems to be that as such evidence is exceptional, it should be confined to narrow limits, and admitted only as a part of the evidence of pedigree, or relationship, and when that fact is a material inquiry.

EDMUND H. BENNETT.

Boston.

RECENT CANADIAN DECISIONS.

Queen's Bench of Manitoba.

McCAFFREY v. THE CANADIAN PACIFIC RAILWAY CO.

A railway company is liable for the loss of a passenger's ordinary travelling baggage, but not for such articles as window curtains, blankets, cutlery, books, ornaments, &c., even when these are packed with the baggage for which they are liable.

When goods remain at the station at which a passenger alights, but it does not appear that the railway company has charged, or is entitled to charge, for storage, the company is not liable as warehousemen.

THIS was a motion to set aside a nonsuit and grant a new trial. The facts are fully cited in the opinion.

J. H. D. Munson, for plaintiff.

J. A. M. Aikins, for defendants.

The opinion of the court was delivered by

TAYLOR, J.—In the month of April 1882, plaintiff's wife purchased from the agent of the Great Western Railway Company, in

the city of Toronto, tickets for the conveyance of herself and children, from Toronto to Winnipeg, over certain lines of railway including that of the defendants. At the time of purchasing the tickets, she had her baggage checked, in the usual way, through from Toronto to Winnipeg. She reached Winnipeg on the 24th of April, and on the following day, she and the plaintiff went to the railway station to get her baggage, and there saw the trunk, the loss of which is the subject of this action. Her other trunks had not at this time arrived, and acting, as she says, on the advice of some person at the station, she did not take it away, but left it to await the arrival of the others. A day or two after, the other trunks arrived, and were taken away by the plaintiff and his wife. The trunk which had first arrived, had however, in the meantime disappeared and has never been received by the owner. For the loss of it, the present action is brought.

The declaration as originally framed had four counts. The first against the defendants as common carriers of goods for hire, alleging a contract to carry certain goods, and charging a breach of the contract. The second is in tort, charging that the goods were lost by the negligence of the defendants while in their possession, as common carriers. The third is against the defendants as werehousemen and bailees. The fourth is in trover. Before the trial, a fifth count was added under an order obtained from the Chief Justice, for the loss of the baggage of the plaintiff's wife, a passenger on the defendant's railway.

The defendants pleaded a number of pleas, those to the fourth count being, not guilty, and that the goods in question were not the goods of the plaintiff.

To the added count the defendants pleaded—first, non assumpsit; second, that the plaintiff did not cause his wife to become and be a passenger with her luggage as alleged; third, that they are not carriers of passengers and their luggage as alleged; fourth, that the luggage was not the property of the plaintiff or his wife as alleged; fifth, that they did safely and securely carry the said luggage; sixth, that so far as the added count relates to the following goods, setting them out in detail, the plaintiff's wife "as such passenger caused to be transferred to the defendants' line of railway, the articles herein before mentioned as part of her personal luggage, to be carried as such luggage, and did not give notice to the defendants that her luggage comprised such articles as the articles herein-

before mentioned, and which was transferred to them as her personal luggage, that the same were not personal luggage, but freight or extra luggage, and should have been paid for as such by the plaintiff's wife, and the defendants would not have received them as personal luggage, if they had known what the articles were, and that the same were while on the said passenger train or at the railway station lost or stolen;" and for a seventh plea, that the luggage was taken to be carried under and by virtue of a contract made with another railway company.

At the trial of the action a nonsuit was entered. The plaintiff afterwards obtained a rule calling on the defendants to show cause why the nonsuit should not be set aside and a new trial had, and the two questions now to be decided in disposing of that rule are, whether the contents of the trunk sued for were, or were not personal luggage, and whether the defendants are, or are not liable as warehousemen.

The contents of the trunk as given in evidence by the plaintiff's wife consisted principally of household furnishings, intended for the use of the family when settled in Winnipeg. Among them were window curtains, blankets, sheets, counterpanes, feather pillows, pillow-slips, cutlery, books, pictures, parlor ornaments, stereopticon and views. There were also two silk dresses, petticoats, childrens' clothing, two suits of gentlemen's clothing, and an opera glass.

In England, it seems now well settled that the personal luggage which a passenger is entitled to have carried with him, in right of his having purchased a ticket for his own conveyance, is limited to such clothing and such articles as a traveller usually carries with him, for his personal convenience. *Great Northern Railway Co.* v. *Shepherd*, 8 Ex. 38: or, as it is expressed in Story on Bailments, sec. 499, "such articles of necessity or personal convenience, as are usually carried by passengers for their personal use." See also *Hudston* v. *Midland Railway Co.*, L. R., 4 Q. B. 371.

The question was fully considered in the case of *Macrow* v. *Great Western Railway Co.*, L. R. 6 Q. B. 612, where the plaintiff having left Canada to settle in England, sued the defendants for a trunk containing sheets, blankets and quilts, lost while he was travelling with it between Liverpool and London, and the court held, that the article being intended for the use of the plaintiff's household when permanently settled, could not be considered as

personal or ordinary passenger's luggage, and therefore the company were not liable. Numerous other English cases to the same effect might be cited, specially *Cahill* v. *London & N. W. Railway* Co., 13 C. B. N. S. 818.

The courts in Ontario have followed the English authorities on this subject. Reference may be made to *Shaw* v. *Grand Trunk Railway Co.*, 7 U. C. C. P. 493. *Bruty* v. *Grand Trunk Railway Co.*, 32 U. C. Q. B. 66 and *Lee* v. *Grand Trunk Railway Co.*, Id. 350.

In the United States a different rule seems at one time to have prevailed, on the ground, that the length of the journey and the requirements of travelling would make articles luggage in that country, which would not be considered such in England.

Thus in *Ouimit* v. *Henshaw*, 35 Vt. 605, a bed, pillows, bedding and bed-quilts, carried by a man travelling from Canada to the United States, were held to be personal baggage.

More recently, however, the American decisions are in accordance with those in England. Thus baggage was held not to include a trunk, containing valuable merchandise. *Pardee* v. *Drew*, 52 Wend. 459; nor samples of merchandise carried to enable the passenger to make bargains: *Hawkins* v. *Hoffman*, 6 Hill 586. So silverware carried in the trunk of a passenger has been held not personal luggage: *Bell* v. *Drew*, 4 E. D. Smith 50; and so a dozen silver teaspoons, a Colt's revolver, or surgical instruments, except the passenger be connected with the medical profession, are not: *Giles* v. *Fauntleroy*, 13 Md. 126. The conclusion to be drawn from the American decisions is given in a note in 2 Redfield's Am. Ry. Cases 138, in which the question of what particular articles may, or may not, be carried by a passenger as luggage, is considered, and it is there said the very word "baggage" or "luggage" as applied to the traveller, implies that it is something which he "bags up" or "lugs along" with him, for his daily comfort and convenience on his journey.

Following then what seems now to be the uniform line of decisions in England, the United States, and Ontario, there can be no doubt that the greater part of the articles contained in the trunk in question did not come within the class of personal luggage, which a passenger is entitled to have carried along with him, in virtue of his having purchased a ticket for his conveyance, and the loss of which will render the carrier liable. No attempt was made to

show on the evidence here, as was attempted in *Cahill* v. *London & N. W. Ry. Co.*, 10 C. B. N. S. 154; 13 Id. 818, and in *Lee* v. *Grand Trunk Ry. Co.*, 36 U. C. Q. B. 350, that the company's servants knew, or from the appearance of the trunk must be assumed to have known that its contents were not ordinary personal luggage.

Although the greater part of the contents of this trunk could not come within the class of personal luggage, some of them did so. The silk dresses, petticoats, and children's clothing may fairly be held to do so, and perhaps the opera glass. The two suits of gentlemen's clothing do not, under the circumstances of this case, for the trunk was being carried along with the plaintiff's wife. Women's dresses carried in a man's trunk, have been held clearly not to be personal luggage, for which the carrier would be responsible: *Miss. P. Ry.* v. *Kennedy*, 41 Miss. 671.

The fact that articles which may fairly be considered personal luggage are packed and carried with others of a different character, does not relieve the carrier from liability for the value of the articles, which are personal luggage. It was so held in *Bruty* v. *Grand Trunk Ry. Co.*, 32 U. C. Q. B. 66, and in *Great N. Ry. Co.* v. *Shepherd*, 8 Ex. 30.

As to the count charging the defendants with liability for this trunk, as warehousemen, we think they are not liable.

The case mainly relied upon by the plaintiff in support of their liability was *Mitchell* v. *Lancashire & Yorkshire Ry. Co.*, L. R., 10 Q. B. 256. The plaintiff's counsel, on the argument, referred to that case as one in which BLACKBURN, J., held that if the defendants could charge storage, then they were bailees for him and liable. He further contended that in the present case, the defendants charged storage upon the other pieces of luggage brought by the plaintiff's wife, so that they clearly came within that case. A reference to the case, however, shows that the language used by the learned judge was, "I think in this case the railway company, in holding these goods, could have charged warehouse rent, and that being so, I think there can be no doubt that prima facie there was a liability as bailees for reward."

In that case a quantity of flax having been consigned to the plaintiff at one of the company's stations, a notice was sent him on its arrival, requiring him to remove it, and stating that the defendants held it, not as common carriers, but as warehousemen,

and subject to the usual warehouse charges. The company clearly put themselves in the position of warehousemen, and gave the plaintiff notice that they intended charging as such for the storage of the flax. Then there was undoubted evidence of such negligence on their part as would render warehousemen liable. The contention of the company on certain words in their notice, that the goods were "at owner's sole risk," amounted, BLACKBURN, J., said, to this, "we are to be paid warehouse rent, and keep them as warehousemen, but we are not to be bound to take any care of them at all."

In fact, the sole question in that case was, whether under the notice as worded the company had any liability at all or not.

In the present case the evidence does not show that defendants charged or were entitled to charge any storage or warehouse rent, for this trunk. As to the payment made on the other trunks, the only evidence is that of the plaintiff himself, and all he said was, in answer to a question, "Did you have to pay anything on that baggage?" "Yes, I paid something like $3.00 for extra baggage and storage." Now the plaintiff's wife travelled with herself and six children on two tickets and a half one, and she had with her five trunks for which quantity a charge for extra luggage might well be made. We think before the defendants can be made liable as warehousemen, there should have been clearer evidence that storage was charged by them on luggage or that they are entitled to make such a charge. Besides there is no evidence of negligence on the part of the defendants. The plaintiff's wife came about the time of the great floods, which in the spring of 1882, interrupted railway traffic, the trunk was seen on the platform at the station, with a number of other trunks, and the plaintiff did not then take it away but requested one of the defendants' servants to put it "under the platform out of the drops of wet." Then we learn from Mr. Pearse, a witness called by the plaintiff, and who is in the employment of the company, for tracing lost baggage and freight, that he saw the trunk at Brandon station, and ordered it to be returned to Winnipeg. His belief is, that the trunk was on its return to Winnipeg stolen. He says it could not be delivered to any one, except on a lost check receipt, and there is no such receipt in existence.

The value of the articles which would properly come within the designation of personal luggage is sworn by the plaintiff's wife to

be $96.50, and the plaintiff cannot claim to put them higher than his own witness, the only one who gives the values, has done. For this amount the plaintiff should have a verdict. If the parties agree to a verdict for this amount being entered, the nonsuit granted at the trial should be set aside without costs. If they do not, as this is a jury case, and we cannot enter a verdict unless agreed to, there must be a new trial without costs.

Passenger preceding or following Baggage.—Ordinarily it makes no difference whether a passenger goes a few hours before or a few hours after his baggage. It is true that it must be carried with him upon his journey, but substantial compliance with this requirement suffices. It need not start or arrive at precisely the same instant as the passenger's departure or arrival. The following instances show this to be the rule of law and illustrate the liability of the carrier: A trunk was taken possession of by the baggage-master, who promised that it should be safely carried to the point designated by the passenger, who, however, did not travel with it. Nothing was said about his paying any compensation for carrying the trunk, which was lost in transit. *Held*, company liable: *Wilson* v. *Grand Trunk Rd.*, 57 Me. 138. A trunk preceded the passenger to his final destination on account of his buying and using a stop-over ticket on the way. It was rifled of its contents by burglars in defendant's waiting-room, where it had been stored. *Held*, company liable: *C., R. I. & P. Rd.* v. *Fahey*, 52 Ill. 106. The baggage was put aboard the car with knowledge of the agent that the passenger was not to go until the next trip. No person was employed to take care of the baggage; each passenger was expected to look out for his own. The trunk was lost. *Held*, company liable: *Logan* v. *Rd.*, 11 Rob. (L. A.) 24; *Warner* v. *Rd.*, 22 Iowa 166. The fact of the passenger having paid no extra fare for the carriage of his baggage makes no difference as to the responsibility of the carrier: *Graffam* v. *B. & M. Rd.*, 67 Me. 234. But where a passenger left port before her baggage arrived for shipment, and caused the delinquent baggage to be shipped on another vessel, and part of it was lost on such vessel, *Held*, that this was an ordinary case of shipment of goods as freight, and that the shipowners were responsible for the loss of the goods as freight: *The Alvira Harbeck*, 2 Blatch. 336.

Storage.—The contract of storage at the place of destination is a part of the original contract to carry, and the party liable on the main contract of carriage is liable on the implied contract of storage: *Brownell* v. *N. Y. C. Rd.*, 45 N. Y. 184. Carriers are liable for baggage left by passengers in charge of their agents, such passengers intending to proceed with the same on the next train, or left for convenience in departing from the place where the baggage is deposited: *C. & A. Rd.* v. *Belknap*, 11 Cush. 97. It is not necessary that the place of deposit of passengers' baggage in a railroad station be absolutely fire-proof or burglar-proof. It need only be such a place as a man of ordinary prudence might use for the storage of his goods: *C., R. I. & Peoria Rd.* v. *Fahey*, 52 Ill. 106. After the arrival of a train or ship a reasonable time will be given to passengers to remove their baggage, during which time the carrier will be held liable, as a carrier, for the safety of such baggage. He will be held an insurer of it; but after the expiration of such time, and especially after notice to the passenger to remove his baggage, the carrier's liability as an insurer ceases, and in

place of it the liability of a warehouseman exists. As a warehouseman, however, he is still bound to preserve the baggage with ordinary care, and is responsible if it be lost through his negligence: *Vanhorn* v. *Kermit*, 4 E. D. Smith 453. Several cases illustrate these propositions: thus where a passenger left for his own convenience his baggage at the station over night, where it was destroyed by accidental fire without the company's fault, it was held not liable: *Ross* v. *M., K. & T. Rd.*, 4 Mo. App. 583; *Roth* v. *Rd.*, 34 N. Y. 548; *Louisville Rd.* v. *Mahan*, 8 Bush 184. In another case a passenger allowed his baggage to remain at the station from ten A. M. until very near the same time next day, and during the day it was the custom of the defendant not to lock up the baggage, but to keep watch over it, and at night it was customarily put under lock and key. The baggage was lost. *Held*, company not liable: *Holdridge* v. *Rd.*, 56 Barb. 191. A passenger of a steamer having arrived at its destination about twelve o'clock at night left the boat in the morning, which was on Sunday, at a reasonable hour for rising, to visit a friend, with the intention of returning before the boat should return for New York on the next day, and then demanding her trunk, for the purpose of continuing her trip to Boston. When she left the steamboat the trunk had been stored by the boatmen in a baggage-room used by them for such purposes; before she returned the trunk and its contents were destroyed by fire without any negligence on the part of the carriers. *Held*, not liable, being mere bailees: *Jones* v. *Transportation Co.*, 50 Barb. 193. A valise left for a few hours was lost. *Held*, that this was a case of gratuitous bailment. Defendant was bound to exercise only slight diligence and liable only for gross negligence: *Minor* v. *C. & N. M. W. Rd.*, 19 Wis. 40; *Louisville Rd.* v. *Mahan*, 8 Bush 184. And where a passenger on a railway omitted for three days to demand his baggage. *Held*, that the company's liability as a common carrier had ceased, and they were only liable as warehousemen: *Fairfax* v. *N. Y. C. Rd.*, 37 N. Y. (S. C.) 516; 43 Id. (S. C.) 18. A trunk was left over night in the common room of defendant's station, instead of being placed in the adjoining baggage-room, where it properly belonged. During the night some unknown person broke into the room, and the trunk, and stole from it certain valuables. *Held*, there being no evidence of any effort to discover the burglar, that defendant was liable as a warehouseman, even if his liability as a common carrier did not still exist: *Warner* v. *Rd.*, 22 Iowa 166; *Bartholomew* v. *Rd.*, 53 Ill. 227. A passenger, who was lame, arrived at his destination on the railroad and told the baggage-master that he was lame and unable to take his baggage with him, but that his father would call for it. At this time his father was absent from home, but he returned in about two days, and called for the trunk as soon as he got back. It had been stored by the baggage-master in the room occupied by passengers, where they usually left baggage and allowed baggage to be taken away. At times no one of the company's employees would be present to watch the baggage. There was a warehouse attached to the depot, but the baggage was not placed in it. *Held*, that the company were liable for the loss of it: *Curtis* v. *Rd.*, 49 Barb. 148. A passenger did not call for his trunk until the second day after his arrival, when it could not be found. The company did not show any proof accounting for the failure to deliver; hence it was *held* that he was entitled to recover: *Burnell* v. *N. Y. C. Rd.*, 45 N. Y. 184. A passenger, at the expiration of his journey, left his baggage with the baggage-man, asking him if it would be safe there until morning. The baggage-man said, Yes, but

the trunk was lost before 3.30 next morning. *Held*, company liable: *Ouimit* v. *Henshaw*, 35 Vt. 604. See also *Mote* v. *C. & N. W. Rd.*, 27 Iowa 22; *Fairfax* v. *N. Y. C. Rd.*, 67 N. Y. 11.

Delivery by Carrier.—Travellers are entitled to require the delivery of their baggage according to the usual course of business: *Ouimit* v. *Henshaw*, 35 Vt. 604. It is the duty of a railway company to have baggage ready for delivery on the platform or other usual place of delivery: *Patscheider* v. *G. W. Rd.*, L. R., 3 Ex. Div. 153. Warehousemen are liable for losses occasioned by the innocent mistake of themselves or of their servants in delivering goods to a person not entitled to them: *Waldron* v. *Rd.*, 1 Dak. Ter. 351. Where a box had nothing to which a check could be attached, and the passenger was informed that it would be just as safe without a check, and started on his journey, relying on this statement, the box having been delivered to a third party without authority, instead of being sent on as contracted: *Held*, that the defendants were liable for the loss of the box: *Waldron* v. *Rd.*, 1 Dak. Ter. 351. If the carrier claims to have delivered the goods to an agent of the owner or consignee, it must be clearly proved that the person to whom delivery was made was in fact agent and duly authorized as such: *Waldron* v. *C. & N. W. Rd.*, 1 Dak. Ter. 351. But delivery may be waived by a passenger, and if his baggage be lost after he has waived delivery to himself personally he cannot recover against the carrier. Thus, where a passenger employed a hackman in Boston to carry himself and two trunks to a house on a certain street, at each end of which posts were placed so that a carriage could not enter it, and upon the carrier proposing that the driver should take another man to assist him in carrying the trunks, the passenger said that he would help, and when they arrived at the entrance to the street he went to the house with a valise, leaving the driver to unload the trunks, and then returned suggesting that they take the heavier trunk first, to which the driver assented, saying: "I will set the other in here," putting the smaller trunk inside the posts, whereupon they went to the house with the larger trunk, and upon their return found that the other trunk was gone. *Held*, that the passenger had waived a delivery of the other trunks at the house: *Patten* v. *Johnson*, 131 Mass. 297. A passenger, on her arrival at Boston, asked permission to leave her baggage for a short time. She was told by the agent that he could not keep baggage so long with the check on, but that it would be perfectly safe if she gave up her checks, which she did. The baggage was subsequently delivered to one falsely claiming authority to receive it. *Held*, that the defendant's obligation as a carrier was ended, and that the assurance of the agent was not a contract for storage, being, in fact, in clear repugnance to the regulations of the company, and that defendant was not liable: *Mattison* v. *N. C. Rd.*, 57 N. Y. 552. When baggage arriving at its destination on one road at night, has to be transferred to another road that connects with it, and the former road, on the arrival of the train, has knowledge of the fact that such baggage has to go on by the next train in the morning over the other road, and with this knowledge stores the baggage in its baggage-room until the morning, the owner not objecting, the question as to whose custody the baggage was in during the night is one which depends upon the usual course of business in these matters: *Ouimit* v. *Henshaw*, 35 Vt. 604. The delivery of baggage by a railway company at the end of the passenger's route, either to the passenger or to his authorized agent, ends the liability of the company as a common carrier, but a delivery at the company's terminus to the baggage-master of an independent steamboat company, who by agreement between the railroad and steamboat com-

panies always enters its cars before their arrival at the depot, taking baggage-checks of through-passengers and giving them company's receipts therefor in exchange, will not free the company from liability caused by the larceny of its servants after the delivery to the steamboat baggage-master, unless he were the plaintiff's authorized agent to receive the baggage: *Mobile & Ohio Rd.* v. *Hopkins*, 41 Ala. 486. A demand for baggage by the passenger is, of course, necessary in order to charge the carrier for the failure to deliver it, but it need not be a demand upon the directors of a corporation which is a common carrier. It is sufficient to make the demand of agents of the company who are charged with the duty of receiving, keeping and delivering passengers' property: *Cass* v. *Rd.*, 1 E. D. Smith 522. And when the baggage is wrongfully detained the owner may assign his title to the property, and the assignee may make a fresh demand for it, and then maintain an action in the nature of trover.

Right to Regulate the Carriage of Baggage and to Limit Liability therefor.—As a general rule a common carrier cannot even by a special agreement with the owner release himself from liability for his failure to exercise ordinary care in transporting baggage: *C. & A. Rd.* v. *Baldauf*, 16 Penn. St. 67. He cannot contract for exemption from liability for damages caused by the negligence, wilful default or tort of himself or his servants. This rule applies when he undertakes to transport passengers gratuitously. It also applies to an express stipulation for tickets limiting the carrier's responsibility to a specific sum, as to the value of the baggage: *Mobile & Ohio Rd.* v. *Hopkins*, 41 Ala. 486. Nevertheless, a carrier of passengers has the right to establish any reasonable regulations which he considers necessary to secure the safety of the baggage of his passengers, and if the passenger knows the regulation, and his baggage is lost, and there is neglect or refusal to comply with it, the carrier is not answerable: *Macklin* v. *N. J. Steamboat Co.*, 7 Abb. Pr. 229. And it may, as an insurer of the property, stipulate against liability for accidents and unavoidable losses: *C., H. & D. & D. M. Rd.* v. *Pontius*, 19 Ohio St. 221. But public notice by a railroad company that all baggage transported on their road is at the risk of the owners will not exonerate the company from its liability as a carrier: *Logan* v. *Rd.*, 11 Rob. (La.) 2, 4; *C. & A. Rd.* v. *Belknap*, 11 Cush. 97; *Jones* v. *Voorhees*, 10 Ohio 145; *C. & A. Rd.* v. *Burk*, 13 Wend. 611; *I. & C. Rd.* v. *Cox*, 29 Ind. 360; *Rd.* v. *Campbell*, 36 Ohio St. 647; *Nevins* v. *Bay City Steamboat Co.*, 4 Bosw. 225; *Rawson* v. *Rd.*, 2 Abb. Pr. (N. S.) 220; *Cohen* v. *S. E. Rd.*, L. R., 2 Exch. Div. 253; *Williams* v. *G. W. Rd.*, 10 Exch. 15.

A carrier may stipulate against liability as an insurer for baggage exceeding a fixed amount in value, except additional compensation proportionate to the risk: *Rd.* v. *Fraloff*, 100 U. S. 24. So he may stipulate that he will not be liable in case of loss for merchandise and jewelry, unless he be notified by the owner that these are in the baggage, and an extra compensation be paid therefor: *Hopkins* v. *Wescott*, 6 Blatch. 64. So he may relieve himself from liability by fire: Id.

Contract or Notice—Construction.—The intention of carriers to limit their liability where it is intended so to do, must be so plainly expressed as to leave no room for doubt as to their meaning. Nothing should remain to be ascertained by construction. Where there is any doubt as to the meaning of a limiting notice, it must be construed strictly as against the carrier: *Hopkins* v. *Wescott*, 6 Blatch. 64. Knowledge of the limitation must be brought home to the passenger in time for him to leave the car and have his baggage removed before the train leaves. The mere delivery of a ticket to a pas-

senger, with a notice printed on its back or on its face, is not generally sufficient to raise the presumption of actual notice to him before the train leaves: *Wilson* v. *Chesapeake & Ohio Rd.*, 21 Gratt. 654; *Macklin* v. *N. J. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229; *Nivens* v. *Bay State Steamboat Co.*, 4 Bosw. 235; *Malone* v. *Rd.*, 12 Gray 388; *Brown* v. *Rd.*, 11 Cush. 97. Where baggage is delivered to carriers according to printed conditions posted in various parts of their boat, the consent of passengers to such conditions is not necessary. It is enough that they know them, and that fact being ascertained, compliance with them will be required by law. But it does not follow, from this, that passengers are obliged to read these notices. They are employed by carriers as a means of bringing to passengers' notice any reasonable regulation: *Gleason* v. *Goodrich Trans. Co.*, 32 Wis. 85. Passengers must be fully informed of the terms and effect of the notice: *C. & A. Rd.* v. *Baldauf*, 16 Penn. St. 67. It has been held, however, that when a cloak-room ticket has on its face a plain and unequivocal reference to the conditions printed on the back of it, a person taking such a ticket is bound by such conditions, whether he has made himself acquainted with them or not: *Harris* v. *G. W. Rd.*, 45 L. J., N. S., Q. B. 729. Many instances are given in the books of attempted limitation of liability of carriers for baggage. Thus where a baggage-man came into a car to re-check baggage, and gave plaintiff a receipt for his baggage marked, "Domestic Bill of Lading," by which the carrier was exempted from liability under certain circumstances, which receipt the passenger put in his pocket without reading, the car being dimly lighted, so that plaintiff could not have read it, had he tried to do so. *Held*, that the carrier, in order to limit its liability, must establish a contract containing the special terms contained in the receipt, and that it was proper to leave to a jury the question whether, under the circumstances, the passenger made such a contract by the acceptance of the receipt: *Madan* v. *Sherard*, 73 N. Y. 329. Generally, and without special limitation, a carrier is not liable for baggage lost by the act of God or the public enemy; but loss by theft is not within either of these exceptions: *Woods* v. *Devin*, 13 Ill. 746. The fact that a guard of soldiers is set over a car, which contains munitions or equipments of war, even throughout the journey, does not relieve the carrier from liability where the control and management of the car, as a part of the train, was not interfered with or impeded in any way by such guard: *Hannibal Rd.* v. *Swift*, 12 Wall. 262. Other cases present instances of limitations of the amount for which the company would be liable: *Pepper* v. *S. E. Ry.*, 7 L. T. (N. S.) 469; *Steamship Co.* v. *Shand*, 3 Moore P. C. C. (N. S.) 272; *Harris* v. *G. W. Rd.*, 45 L. J. (N. S.) 729; *Vantoll* v. *S. E. Ry.*, 12 C. B. (N. S.) 75; *Steers* v. *L., N. Y. & P. Steamship Co.*, 57 N. Y. 1.; *Rd.* v. *Fraloff*, 100 U. S. 24.

Actions—Parties.—A number of cases present the question, "Who has a right to sue for damages occasioned by the loss of or injury to baggage in transit?" When an agent contracts and pays for the carriage of goods in the conduct of their owner's business, and for his account, the action to recover for their loss should properly be brought in the name of the owner: *Slowman* v. *G. W. Ry.*, 67 N. Y. 208. But where plaintiff gave his valise to his servant to take with him on defendant's railway, the plaintiff himself intending to travel by a later train, and the servant bought his ticket, and the valise in charge of the servant was checked as the servant's personal baggage, and was within the weight allowed him by law as personal baggage, *Held*, that the owner of the baggage was not the proper person to maintain an action against the company for the loss thereof,

although he travelled on the same day and on the same route by a later train: *Becher* v. *Rd.*, L. R. 5 Q. B. 241. So where a travelling salesman paid his fare as a passenger in a railroad car and committed a trunk containing money belonging to his principal, not exceeding a reasonable amount for travelling expenses, to the agent of the company, but without notice that the trunk contained money, and it was lost, *Held*, that the action would not lie in the name of the principal upon the contract existing between the agent and the carrier: *Weed* v. *Saratoga & Schen. Rd.*, 19 Wend. 534; *Stimson* v. *Conn. Rd.*, 78 Mass. 83. Whether a married woman can sue in her own name for the loss of her personal baggage is governed by the law of the place where the remedy is sought. Some cases hold that a married woman may sue for such baggage: *Stoneman* v. *Erie Rd.*, 52 N. Y. 29; *Fraloff* v. *N. Y. C. & H. R. Rd.*, 10 Blatch. 16; *Rawson* v. *Penn. Rd.*, 2 Abb. N. S. 220; *McCormick* v. *Penn. Rd.*, 49 N. Y. 303. An infant may bring an action by his next friend to recover damage for the loss or injury to his baggage.

Other cases present questions as to who may be sued for the loss of baggage. Thus whether the driver of a cab or the proprietor thereof is liable. A cab plying in London in the ordinary way was hired by the plaintiff to carry his baggage, which was lost by the fault of the driver. On the cab was the name of the defendant, as proprietor of it, which he in fact was. The driver paid each day a certain sum of money to the defendant for the use of the equipage, and made what he could by the transaction. *Held*, under the statute that the driver must be taken to be an agent of the proprietor, with authority to make contracts for the employment of the cab on his account, and that consequently the action was rightly brought against the proprietor: *Powles* v. *Hyder*, 6 El. & B. 207. A foreign corporation doing business as a carrier of passengers may be sued in New York to recover the value of lost baggage: *Jones* v. *Trans. Co.*, 50 Barb. 193. The form of the action may be either in tort or *ex contractu*. An action of tort before a police justice is the proper form of suing for a penalty of $10, provided by the stat. 1854, c. 23, for the refusal of a railroad company to take the baggage of a company delivered to it for transportation: *Commonwealth* v. *Rd.*, 15 Gray 447.

Pleadings.—In declaring on the common-law obligation of a common carrier it is only necessary to allege the delivery of the goods to their carrier to be carried by him over the designated route, and that they were received and accepted by him. On these facts the duty arises, for a breach of which the carrier is liable to the shipper: *Wilson* v. *Chesapeake & Ohio Rd.*, 21 Grat. 654. It must be alleged that the loss occurred through the defendant's negligence: *Candee* v. *Penn. Rd.*, 21 Wis. 582. The plaintiff need not allege that the baggage was lost without his fault: *Richards* v. *Wescott*, 2 Bosw. 590. In suits before a justice of the peace it is sufficient to file such a statement of the cause of action as will apprise the defendant of the nature of the demand on such certificate that a second suit cannot be maintained for the same cause of action: *Leelin* v. *Rd.*, 10 Mo. App. 128. It need not be alleged that the plaintiff went as a passenger, and that the trunk was taken as a part of her baggage: *Wilson* v. *Chesapeake & Ohio Rd.*, 21 Grat. 654; *Davis* v. *Rd.*, 10 How. 330. Under an allegation that a hack was unfit for service, evidence is admissible that it was overloaded: *Lemon* v. *Chanslor*, 68 Mo. 340.

Defences—Merchandise.—The general rule is that the articles for which a railway or other carrier is liable to carry safely as baggage include only such as are necessary to the use, comfort and convenience of the passenger during the journey or immediately thereafter.

What these articles are depends upon the social position of the passenger, length of journey and the country through which or to which the passenger travels. In some respects the rule is comparable to the rule of law which regulates the liability of an infant for necessaries, that is, for such articles as he buys that are suitable for his use, having in consideration the social position and standing of the infant. Just so social position is to be considered in determining what is proper baggage for a passenger. Valuable jewels have been considered appropriate baggage for a Russian countess, and would probably be so considered when carried by any person of wealth and high social standing. So the amount of baggage which a person may carry upon a long journey may obviously be greater than if the journey was a short one to an adjacent city or village. One of the limitations of the liability of a carrier arises out of the kind of property carried by the passenger as baggage, as thus, a carrier is not liable for merchandise carried as baggage: for example, for jewelry carried by the commercial traveller of a jewelry house: *Alling* v. *B. & A. Rd.*, 126 Mass. 121; *Richards* v. *Wescott*, 2 Bosw. 590; *Collins* v. *Boston & Maine Rd.*, 10 Cush. 506; *Cahill* v. *Rd.*, 10 C. B. (N. S.) 154; *Bluemantle* v. *Fitchburg Rd.*, 127 Mass. 322; *Pardee* v. *Drew*, 25 Wend. 459; *Belfast, &c., Rd.*, v. *Keys*, 9 H. L. C. 555; *Cahill* v. *L. & N. W. Rd.*, 13 C. B. N. S. 818; *Cin. & Chic. Air Line Rd.* v. *Marcus*, 38 Ill, 219; *Stimson* v. *Conn. River Rd.*, 98 Mass. 83; *Smith* v. *Rd.*, 44 N. H. 325; *Rd.* v. *Capps*, 23 Am. L. Reg., N. S., and note. Of course if the railroad company or its agents be informed that the trunk or box of the passenger contains merchandise they may be held liable therefor, having been given notice of its contents and an opportunity to charge extra compensation for the carriage of it, and to take all necessary precautions for its safe preservation. The fact that commercial travellers or others are accustomed to carry merchandise in passenger trains, they paying the usual price for tickets of a passenger, even if known to the carriers, will not render them liable for such merchandise. The passengers carry it at their own risk: *Alling* v. *B. & A. Rd.*, 126 Mass. 121. So a railroad company has been held not liable for a watch and handcuffs, locks, medicines, &c., carried by a passenger: *Bomar* v. *Maxwell*, 9 Humph. 621. But it has been held in at least one case that if the package of merchandise is carried openly or so packed that its nature is obvious, and the carrier does not object to it, he will be liable for the loss of it: *Great North. Ry.* v. *Shepherd*, 8 Exch. 30. And where a carrier demands and receives compensation as freight for the transportation of the merchandise, he is liable for it as well as for the baggage: *Stoneman* v. *Rd.*, 12 N. Y. 419; *Ross* v. *Mo., K. & T. Ry.*, 4 Mo. App. 583. Where plaintiff wished to go from Little Falls, N. Y., to New York city *via* Albany, and sent his trunk, on the suggestion of the New York Central Railroad Company, from Little Falls to Athens, "*via* the People's Line of Steamers," to New York, *via* Albany on the railroad, and the baggage was lost, *held*: that the railroad company was not liable for it, there being no contract between it and the steamboat company, but simply an occasional transaction of this kind: *Green* v. *N. Y. Central Rd.*, 12 Abb. Prac. N. S. 473.

A passenger on a railroad informed its agent that his trunk contained merchandise, in addition to his personal baggage, and paid the agent a compensation for the extra weight as demanded, and the trunks were destroyed, and the passenger brought an action to recover for the loss of the baggage, in which the court ruled that he could not recover for the merchandise, but that he could, and in fact, did recover for the baggage. *Held*, in a subsequent action brought to

recover the value of the merchandise lost, that the former action was not a bar, since the two actions were based upon separate contracts: *Millard* v. *M., K. & T. Rd.*, 86 N. Y. 441.

Evidence.—As a general rule, the agents of a corporation whose duty it is to receive and take care of baggage, are competent persons to testify as to its care, condition and transportation. So a check is competent to prove the receipt of baggage by a carrier. The evidence of any witness who saw the baggage delivered to the carrier will be competent. Questions have been raised as to the competency of the husband or wife to testify as to loss of each other's baggage. Although the general rule is that a wife is not a competent witness in behalf of the husband, where the husband is a party, yet where the husband is plaintiff in a suit for lost baggage, both her testimony and his are admissible, from the overruling necessities of the case. They alone know the contents of the baggage, and must testify as to its value and contents, else the verdict of the jury upon these points would in most cases be mere guess work. In favor of this view see *Dibble* v. *Brown*, 12 Ga. 217. As to check, see *Hickox* v. *Rd.*, 31 Conn. 281. Still it has been held that in such a case the wife is not a competent witness: *Smith* v. *Rd.*, 44 N. H. 325. Some of the old cases hold that in an action against a railroad company to recover damages for the loss of baggage by its negligence, the plaintiff is not a competent witness, although he has no other evidence: *Snow* v. *Rd.*, 12 Met. 44; *Dill* v. *Rd.*, 7 Rich. Law (S. C.) 158; *Smith* v. *Rd.*, Martin's Law 203; *Pettigrew* v. *Barnum*, 11 Md. 434. In Indiana while the competency of the plaintiff himself was admitted, his *ex parte* affidavit as to the contents and value of the baggage lost was excluded: *Indiana C. Rd.* v. *Gulick*, 19 Ind. 83. See also *Pudor* v. *Rd.*, 26 Me. 458. In New York it has been held that the rule of evidence allowing the plaintiff to prove the value of the contents of his lost trunk by his own oath, is confined to cases in which fraud or wrong is proved by the defendants, and has no application to cases of loss through negligence merely: *Garvey* v. *Rd.*, 4 Abb. Pr. 171. But probably the rule of law that a passenger is not competent to prove the contents and value of his own trunk has been abrogated by the statute permitting parties to actions to testify therein on their own behalf: *Am. C. Co.* v. *Cross*, 8 Bush 472; *Jones* v. *Voorhees*, 10 Ohio 151. In Pennsylvania it has been held that trunks of husband and wife being lost on a journey, both are competent to testify as to the contents and their value, and especially may the wife be assumed usually to have packed the trunk: *McGill* v. *Rowand*, 3 Penn. St. 451; *I. C. Rd.* v. *Copeland*, 24 Ill. 332; see *Pettigrew* v. *Barnum*, 11 Md. 434. In Tennessee the same rule has been affirmed, but limited in its application to personal baggage, and not to merchandise, the delivery of which to the carrier, it was held, must be evidenced by bills of lading: *Johnson* v. *Stone*, 11 Humph. 419. In Illinois it was held that a person suing a railroad company for the value of lost baggage is only permitted to be a witness in his own case for the purpose of proving the contents of the lost baggage, when no other evidence can be adduced. He may be permitted also to prove the value of the contents, but he should not be allowed to give evidence as to the value of the articles in which the baggage is packed: *Davis* v. *Michigan So. Rd.*, 22 Ill. 278. To the effect that a passenger may prove the value of the contents of his own baggage, see also *Nolan* v. *O. & M. Rd.*, 39 Mo. 114; *Doyle* v. *Kiser*, 6 Ind. 242; *Dibble* v. *Brown*, 12 Ga. 217; *Merrill* v. *Grinnell*, 30 N. Y. 549; *Harlow* v. *Rd.*, 8 Gray 237.

Admissions.—The price paid for a railroad ticket includes the carrying of

baggage, and the recognition by the company issuing the ticket of its validity, is an admission that the check given for the baggage is equally binding: *C., R. I. & P. Rd.* v. *Fahey*, 52 Ill. 81. A delivery of checks to a connecting carrier is evidence tending to show the delivery of the baggage represented by such checks to said carrier: *Kan. Pac. Rd.* v. *Mantelle*, 10 Kan. 119. The admissions of the conductor, baggage-master or station-master, as to the manner of the loss, are admissible in evidence against the corporation: *Morse* v. *Rd.*, 6 Gray 450. But probably such admissions would be required to have been made so near the time of the loss or damage to the baggage as to be part of the *res gestæ: Rd.* v. *Campbell*, 36 Ohio St. 649; *Curtis* v. *Rd.*, 49 Barb. 148. A statement made to the plaintiff by the superintendent of a railroad company on presentation of plaintiff's claim that the claim was a "good one," constituted no part of the *res gestæ*, but related to a past transaction, and was held inadmissible as evidence against the railroad company: *Green* v. *N. Y. C. Rd.*, 12 Abb. Pr. N. S. 473.

In an action against a railroad company to recover the value of a trunk and its contents alleged to have belonged to the plaintiff as a passenger, and to have been lost by the company, the evidence tended to show that the trunk belonged to a third person who took it away from the depot without the knowledge of the agent of the company, and then procured the plaintiff to bring suit for its recovery. The evidence tending thus to show the community of interest and design between the plaintiff and such third person: *held*, that a letter written by the latter to a stranger to the transaction going to show the conspiracy was admissible in evidence against the plaintiff: *C., R. I. & P. Rd.* v. *Collins*, 501 Ill. 212.

Presumptions.—In the absence of proof of any contract on the part of the carrier to carry a passenger and baggage to any particular place or city in the carrier's port of destination, it will be presumed that the carrier undertook to transport the passenger and baggage to the place in the port fixed by the established usage and custom of the carrier for the landing of its passengers and their baggage: *Klein* v. *Packettt Co.*, 3 Daly 390. So, assent to conditions affecting liability is presumed from the acceptance of a carrier's receipt or bill of lading: *Steers* v. *L., N. Y. & P. Steamboat Co.*, 57 N. Y. 1. That the loss of a trunk is presumed to have been evidence of the negligence or fraud of the carrier or its agent: *C. & A. Rd.* v. *Baldafu*, 16 Penn. 67. See also *Fairfax* v. *N. Y. C. & H. R. Rd.*, 37 N. Y. 516; *Brownells* v. *N. Y. C. Rd.*, 46 N. Y. 184. But see *Stimson* v. *Conn. River Rd.*, 98 Mass. 83; *Smith* v. *Rd.*, 44 N. H. 325. The court may take judicial notice of established railroad routes generally known and used: *Fairfax* v. *N. Y. C. Rd.*, 37 N. Y. (S. C.) 516.

Miscellaneous Instances.—To justify a common carrier in his defence that he had limited his liability substantially by notice brought home to the knowledge of the plaintiff, the evidence must show not only that the plaintiff had his attention called to the carrier's notice, limiting his liability in certain expressed contingencies, but it must also appear that the passengers assented to the terms and conditions of the notice: *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw. 225. The possession of checks by a passenger, and the testimony of the baggage-master that when required by passengers he put checks on their baggage, giving the duplicates to the passenger, is enough to prove that the plaintiff was a passenger, and that his baggage was checked: *Davis* v. *C. S. Rd.*, 10 How. Pr. 330. So it has been intimated by Judge WOODRUFF that if a passenger's residence, business, station in life, place from whence he came and whither

he was going, and the fact whether he was a rich or a poor man, and where he had been travelling, were matters which affect the carrier's liability; they should have been shown by actual evidence to have been brought within the knowledge of the carrier when it undertook to carry the plaintiff: *Nevins* v. *Bay State Steamboat Co.*, 4 Bosw. 225. Proof of the general care with which the baggage-room and its contents were guarded is not sufficient to establish conclusively that there was no want of care in the particular instance on trial: *Fairfax* v. *N. Y. C. Rd.*, 67 N. Y. 11. Where there is no proof that plaintiff is a surgeon or physician, or student of medicine, he cannot recover for the loss of a case of surgical instruments: *Giles* v. *Fauntleroy*, 13 Md. 136. The mere fact of a traveller who has secured a stateroom choosing at first to wear his overcoat rather than deposit it in the stateroom in the custody of the defendant, is no indication that he intends to hold the overcoat in his possession during the whole trip: *Gore* v. *Norwich Trans. Co.*, 2 Daly 254. The words "personal baggage," written in pencil on the margin of a receipt for goods to be shipped on an ocean voyage, there being no evidence as to when and by whom said pencil marks were written, does not alter the fact that the goods thus shipped without the owner accompanying them are freight, and not personal baggage: *Re Alvira Harbeck*, 2 Blatch. 236. Evidence that passengers other than the plaintiff were allowed by the defendant railroad company to take with them, as passengers, bundles of merchandise, and without objection on the part of defendant, has no legal tendency to an agreement that they were to be regarded as a part of their baggage and paid for by the passsenger's ticket, or were to be taken at the risk of the company: *Smith* v. *Rd.*, 44 N. H. 325.

Damages—Measure.—The usual contract of a carrier of passengers includes an undertaking to receive and transfer their baggage. If nothing be said about it, and if the baggage be lost, even without the fault of the carrier, he is responsible for it. The actual damages arising from the breach is the measure of damages in this form of action: *Mississippi Rd.* v. *Kennedy*, 41 Miss. 671. Damages cannot be recovered for expenses in searching for lost baggage: *Texas & P. Rd.* v. *Ferguson*, 9 A. & E. Railroad Cas. 395. The market value of the articles lost is deemed an ultimate compensation, and this is the proper measure of the right of recovery: *Texas & P. Rd.* v. *Ferguson*, 9 A. & E. Railroad Cas. 395. Where money is lost in a trunk the passenger can only recover for so much money as was necessary for his personal use and travelling expenses during the journey: *Hickox* v. *Rd.*, 31 Conn. 281. In the absence of proof as to the contents of a trunk and their value, damages may be given by the jury proportionately to the value of the articles which they, in their judgment, think the trunk did and might fairly contain: *Dill* v. *Rd.*, 7 Rich. Law (S. C.) 158. It is an error to instruct a jury in a suit for damages against a railroad company, in which exemplary damages are claimed, to return a verdict for such damages which they believe, from the evidence, the plaintiff is entitled to, without furnishing a rule for their guidance in discriminating between actual and exemplary damages: *G., H. & S. A. Rd.* v. *Dunlavy*, 56 Texas 256.

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